RE: MD. EJIA ELIZABETH FREDERICKS; EX-PARTE: OVERSEA-CHINESE BANKING CORPN. LTD.

HIGH COURT, SHAH ALAM
DATUK WIRA WAN YAHYA BIN PAWAN TEH J.
[BANKRUPTCY NO. 29 - 1837-91]
15 JULY 1992

BANKRUPTCY: Judgment in respect of continuing guarantee - Guarantee limited in respect of amount - Judgment amount satisfied by auction sale - Whether proper for plaintiff to bring bankruptcy proceedings for the balance owing by the borrower on the grounds that the guarantee was a continuing guarantee.

The judgment creditor obtained final judgment against the judgment debtor in respect of a continuing guarantee entered into by the judgment debtor with the judgment creditor for the benefit of the borrower. The guarantee agreement limited the amount recoverable from the judgment debtor to RM50,000.The judgment creditor foreclosed on the judgment debtor's property and realised the sum of RM51,000.

Subsequently the judgment creditor caused to be served on the judgment debtor a bankruptcy notice for the sum of RM56,056.04 on the grounds that the sum claimed from the judgment debtor was only part of the whole debt due from the borrower and since the judgment debtor's guarantee was a continuing one, the amount demanded on the bankruptcy notice had been validly made. The judgment debtor applied to set aside the bankruptcy notice.

Held:

[1] The guarantee provided by the judgment debtor although stated to be a continuing one was specifically limited by clause 4 of the agreement to a sum of RM50,000 only. The liability of the judgment debtor as a guarantor was restricted to that specified sum and not the amount due from the borrower.

[2] The amount claimable under a bankruptcy notice is not necessarily the sum obtained in a judgment but the amount on which the judgment creditor is entitled to proceed in execution if such execution has not been stayed. So the sum which the judgment creditor is entitled to claim in his bankruptcy notice should be the amount adjudged less any sums paid before the issuance and service of the bankruptcy notice.

[3] When money has been paid into Court before the service of the bankruptcy notice, that sum, if it is less than the entire sum adjudged, must be taken as payment in part satisfaction of the debt and execution could only be issued on the balance.

[4] There was a serious error in computing the amount claimed in the bankruptcy notice which had resulted in a larger sum being demanded from the judgment debtor.

[Application allowed. Bankruptcy notice set aside].

Cases referred to:
Re Arunachalam [1968] 1 MLJ 89 ***(foll)***
Re Child 1892 2 QB 77 ***(foll)***
Re Miller [1912] 3 KB 1 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)

For the Judgment Creditor - Mary Nithingham; M/s. Shook Lin & Bok
For the Judgment Debtor - V. Rajehgopal; M/s. V. Rajehgopal & Associates

JUDGMENT

Wan Yahya Bin Pawan Teh J:

On 25 January 1991 the Judgment Creditor (JC) obtained a final judgment against the Judgment Debtor (JD) at the Sessions Court Klang for the sum of RM50,000 and RM2,867 costs. This judgment was in respect of a continuing guarantee entered into by the JD with the JC for the benefit of one Teloga Edar Sdn. Bhd. (the borrower).

Clause 4 of the guarantee agreement which limited the guarantee to RM50,000 only but left the portion on rates claimable unfilled, reads as follows:

> 4. This guarantee shall be a continuing guarantee to you to the extent of Malaysian Dollars Fifty thousand only (RM50,000) for the purpose of securing not merely an equivalent amount but (subject always to the said limit of RM50,000) the whole of the money or general balance in the first paragraph

> hereof mentioned notwithstanding any such payments receipts or dividends as are hereinbefore mentioned with interest on the sum claimable from us at the rate of ... per RM100 per mensem from the date of our receiving demand for payment thereof from which date you may at your discretion refuse further credit to the customer and close his account.

The above limitation of the same guarantee is again reflected in clause 1 of the Annexure to the charge instrument.

At about the same time as the judgment, the JC also commenced foreclosure proceedings against the JD and after various unsuccessful auctions, the JD's land was eventually sold on 27 May 1991 for a sum of RM51,000.

On 27 May 1991 a sum of RM5,100 being 10% of the auction sum was paid into Court and the balance was paid on 15 November 1991. However, on 22 December 1991 the JC caused to be served a Bankruptcy Notice on the JD for the sum of RM56,056.04.

Within 7 days of the service of the notice, the JD filed the present application.

The JD's objection is on the excessive amount claimed by the JC as well as the computation of interest as stated in the notice.

It was argued on behalf of the JC that as the total sum still owing to the borrower stood at a figure of RM115,478.15, the JC was well within his right to recover the sum claimed on the Bankruptcy Notice. According to the JC as the sum claimed from the JD was only a part of the whole debt due from the borrower and since the JD's guarantee is a continuing one, the amount demanded on the Bankruptcy Notice has been validly made.

I am unable to agree with the JC's Counsel's view. The guarantee provided by the JD although stated to be a continuing one is specifically limited by clause 4 to a sum of RM50,000 only. The liability of the JD as a guarantor is therefore restricted to that specified sum. Hence that was the amount on which the JC sued and subsequently obtained judgment. In any event the act of bankruptcy as specified in s. 3(1)(i) of the Bankruptcy Act pursuant to which the notice was issued relate only to the amount obtained in a final judgment or order. In the present case the final judgment is for RM50,000 and RM2,867 costs against the JD and not the amount due from the borrower.

It is notable that the sum claimed in the Bankruptcy Notice represented the amount given in the judgment obtained against the JD on 25 January 1991 but since that date the JC had on 27 May 1991 realised a sum of RM5,100 as part payment for the auction sale of the JD's land and on 22 December 1991, that is, the day he took out the Bankruptcy Notice, the balance payment of RM45,900 had been paid. So on the day the Bankruptcy Notice was served the entire RM51,000 proceeds from the auction of the JD's land had been paid to the JC thus leaving a small sum of RM1,867 if at all due. Even if the JC is to contend that the balance payment had been made after the issue of the Bankruptcy Notice, that is, on 11 November 1991, he was none the less aware of the RM5,100 paid earlier. Moreover, the notice was only served on 22 December 1991 and during the interim days he did nothing to amend it.

The amount claimable under a bankruptcy notice as I understand it, is not necessarily the sum obtained in a judgment but it is the amount on which the JC is entitled to proceed in execution if such execution has not been stayed. So the sum which the JC is entitled to claim in his Bankruptcy Notice should be the amount adjudged less any sums paid before the issuance and service of the Bankruptcy Notice - In *Re Arunachalam* [1968] 1 MLJ 89, Chang Min Tat J (as he then was) dealt with this particular issue as follows:

> ... the judgment-debtor does not, in my view, deny the existence of any debt to the judgment-creditor. What he does deny is the debt of RM4,344.64 cents as claimed in the notice, but it seems to me he does not and cannot be taken to deny the existence of a debt for a smaller amount. If any doubt exists on this point, his next sentence that he disputes the validity of the bankruptcy notice would make it clear that he does not say he could not be adjudicated a bankrupt on a proper notice on the facts as existing then between the parties, but what he says is that he could not and should not be made the subject of any receiving or adjudicating orders on that particular notice.

It would appear that where part of the judgment debt has been paid, a notice can only be issued for the balance. In *Re Child* [1892] 2 QB. 77, Vaughan C Williams, J in his judgment at p. 79 said

> I think that under it a creditor who has obtained final judgment is not entitled to serve a bankruptcy notice in respect of any amount greater than that for which he could have issued execution, and that, therefore, if the circumstances of the case are such that he has ceased to be entitled to issue execution for the whole amount of the judgment debt, he has ceased to be entitled to serve a bankruptcy notice for the whole amount of the judgment debt.

Further on in his judgment with regards to the clause "on which execution has not been stayed" the learned Judge observed:

> It can scarcely, I think, have been the intention of the legislature that a judgment debtor should be liable to be served with a bankruptcy notice claiming from him a sum which is not due, inasmuch as it has been paid by him and accepted by the judgment creditor in reduction of the judgment debt;

This principle was considered and applied in *Re Miller* [1912] 3 KB 1.

Similarly there is an error in computing the interest. The amount claimed should have been from the date of judgment, that is, on 25 January 1991 to 11 November 1991. Even on the assumption that the balance of RM45,900 had not yet been received by the JC when the notice was issued, it was indisputable that a sum of RM5,100 representing 10% of the purchase price had been paid on 27 May 1991.

In para 8 of the affidavit of Lim Din Seng, sworn on 20 March 1992, the J.C. in admitting that the entire proceeds of the auction had been paid into Court and so raised the issue that such act on its own will not effectuate a reduction of the original debt until and unless the sum so paid had been received by the creditor.

In my view when money has been paid into Court before the service of the Bankruptcy Notice, that sum, if it is less than the entire amount adjudged, must be taken as payment in part satisfaction of the debt and execution could only be issued on the balance. In *Re Miller (supra)* after the issuance of a judgment notice for £57. 5s. 6d. the judgment debtor paid £10. 00s. 00d. into Court. It was held that after payment into Court, execution could not issue for the full amount of the judgment, but only for the balance after giving credit for the amount paid into Court and consequently the bankruptcy notice was held to be invalid.

After perusal of the affidavit and the documents exhibited herein, I am satisfied that there has been a serious error in computing the amount claimed in the Bankruptcy Notice which had resulted in a larger sum being demanded from the JD

I therefore set aside the bankruptcy notice as the sum demanded therein is in excess of the sum for which execution could have been issued.